SHAMALA SATHIYASEELAN

v.

DR JEYAGANESH C MOGARAJAH

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[ORIGINATING SUMMONS NO: S8-24-3586-02]
11 SEPTEMBER 2003

FAMILY LAW: *Children - Custody - Children of Hindu marriage - Wife applied for custody of children after husband converted to Islam - Whether civil court had jurisdiction to hear application - Whether husband's custody application granted in syariah court bound wife - Whether syariah court had no jurisdiction over wife as she was a non-Muslim - Whether wife had legal guardianship of children under the Guardianship of Infants Act 1961 - Whether husband's obligation under Hindu marriage was not extinguished or avoided by his conversion to Islam - Whether Hindu marriage could only be dissolved by a petition presented by wife under s. 51 Law Reform (Marriage & Divorce) Act 1976*

CIVIL PROCEDURE: *Jurisdiction - Custody - Children of Hindu marriage - Wife applied for custody of children after husband converted to Islam - Whether civil court had jurisdiction to hear application*

The plaintiff wife and the defendant husband were both Hindus at the time of their marriage. Their marriage was solemnised in a Hindu temple and registered under the Law Reform (Marriage & Divorce) Act 1976 ('Act 1976'). There were two children of the marriage ('the children'). The defendant converted himself and the children to the Islamic faith. The children were converted without the plaintiff's consent. The plaintiff then filed for custody of the children in the High Court. The defendant, however, applied to the syariah court for hadanah (custody) and obtained a warrant of arrest against the plaintiff when she failed to attend the syariah court hearing. Meanwhile an interim order was issued by the High Court regulating the defendant's right of access to the children and payment of maintenance. The interim order also stayed the warrant of arrest that was issued against the plaintiff. Nonetheless, the plaintiff received an order from the syariah court granting custody of the two children to the defendant. Further, the defendant did not return the children to the plaintiff after he had taken them away on one of his visits. He also discontinued payments for maintenance.

The plaintiff now prayed for the following, *inter alia*: (1) that she was not bound by the syariah court order giving the defendant custody of the children as she was not a Muslim and as she had legal guardianship of the children; (2) that the defendant should be restrained from enforcing the warrant of arrest pending the outcome of her custody application; and (3) that the defendant should be committed to prison for failing to comply with the interim High Court order when he did not return the children to her and also failed to make payments for maintenance.

Held:

[1] The civil court had the jurisdiction to hear this case which involved parties concerning their civil marriage. The fact that the defendant had converted to Islam did not change the status of their civil marriage. The defendant's obligation under the Hindu marriage could not be extinguished or avoided by his conversion to Islam. (p 511 c)

[2] Under s. 5 of the Guardianship of Infants Act 1961 ('Act 1961'), the mother of an infant shall have like powers of applying to the court in respect of any matter affecting the infant as possessed by the father. In relation to the custody and upbringing of an infant, a mother shall have the same rights and authority as the law allows to a father and the rights and authority of mother and father shall be equal. In this case, the children of the marriage were still infants under Act 1961. (p 511 e-f)

[3] The syariah court had no jurisdiction on parties who were non-Muslim. Although the *ex parte* hadanah application in the Selangor syariah court was endorsed by the Kedah syariah court which had reciprocal enforcement arrangements with the Selangor syariah court, it was still not binding on the plaintiff as she was a non-Muslim. Further, the subsequent hadanah order by the Selangor syariah court was not endorsed by the Kedah syariah court. (pp 512 g-h & 518 d)

[4] Section 51 of Act 1976, *inter alia*, provides that where one party to a marriage has converted to Islam, the other party who has not converted may petition for divorce. By the defendant's conversion to Islam, s. 51 had given the plaintiff the right to petition for a divorce. The defendant could not apply for divorce under the Islamic family law as the syariah court had no jurisdiction to deal with cases where one of the parties was a non-Muslim. (p 513 e-g)

[5] Although s. 46 of the Islamic Family Law (Federal Territories) Act 1984 gives the syariah court power to confirm that the conversion to Islam by either party to a non-Muslim marriage may dissolve the marriage, this does not terminate the marriage as far as the other party is concerned. By virtue of s. 4 or s. 8 of Act 1976, such marriage if valid, shall continue until dissolved: (a) by the death of the parties; (b) by order of a court of competent jurisdiction; or (c) by a decree of nullity made by a court of competent jurisdiction. (p 513 g-h)

[6] The defendant by converting to the Islamic faith was in effect converting his marital status from a monogamous marriage to a polygamous marriage. Under s. 51 of Act 1976 he could not file for divorce against his unconverted plaintiff wife who was still a Hindu. She remained his wife though a non-Muslim. Only she could petition for divorce under s. 51 on the ground that the defendant had committed a matrimonial offence by his conversion to Islam. Although the defendant could not file for divorce against the plaintiff, he could take another wife as he was now practising a polygamous marriage. His wife by Hindu rites remained his wife. He had to support her and the children until and unless the civil marriage was dissolved upon a petition presented by the plaintiff wife under s. 51 of the Act. (pp 514 h & 515 a-b)

[7] The defendant did not return the children to the plaintiff in breach of the interim High Court order. That was in contempt of court. The fact that the custody of the two children was given to the defendant by virtue of the syariah hadanah order did not change the status of the interim High Court order that was given earlier than the syariah court order. As the interim High Court order was made by a court of competent jurisdiction, it was equally binding on the plaintiff and the defendant. (p 518 b)

[Applications by plaintiff wife granted.]

Case(s) referred to:
Hunter v. Chief Constable of the West Midlands Police & Ors [1982] AC 529 ***(refd)***
Mohamed Habibullah Mahmood v. Faridah Dato' Talib [1993] 1 CLJ 264 SC ***(refd)***
Pedly v. Majlis Agama Islam, Pulau Pinang [1990] 2 MLJ 307 ***(refd)***

Legislation referred to:
Federal Constitution, art. 121
Guardianship of Infants Act 1961, ss. 4, 5, 8, 51
Islamic Family Law (Federal Territories) Act 1984, s. 46
Rules of the High Court 1980, O. 45 r. 7(5), (6), (7), O. 52 r. 2

For the plaintiff - Revi Nekoo (Parameswary & R Sivarasa); M/s Nekoo Parames & Tung
For the defendant - JT Sambanthan (M Menon); M/s Jaffar & Menon

Reported by Usha Thiagarajah

JUDGMENT

Faiza Tamby Chik J:

There are two cases before me today involving the same parties, Shamela a/p Sathiyaseelan, the wife as plaintiff and Dr. Jeyaganesh a/l C. Mogaraj, the husband as defendant. Both the cases were heard together since I took over on 7 July 2003. In Saman Pemula No. S8-24-297-2003 there are two enclosures. Enclosure (1) is an application by the plaintiff wife praying for:

1. Satu deklarasi bahawa Perintah Ex-parte Mahkamah Tinggi Syariah Shah Alam bersamaan kes Mal Bil: 10200-028-03/2003 dan/atau mana-mana perintah yang lain dalam prosiding yang sama dan/atau mana-mana prosiding lain di mana-mana Mahkamah Syariah yang dibawa oleh Defendan tidak mengikat Plaintif kerana Plaintif adalah seorang bukan Islam;

2. Satu deklarasi bahwa Perintah Ex-parte Mahkamah Tinggi Syariah Shah Alam bersamaan kes Mal Bil: 10200-028-03/2003 dan/atau mana-mana perintah yang lain dalam prosiding yang sama dan/atau mana-mana prosiding lain di mana Mahkamah Syariah yang dibawa oleh Defendan memberi hak penjagaan Saktiswaran dan Theiviswaran (seterusnya dikenali sebagai "anak-anak tersebut") kepada Defendan tidak mengikat Plaintif kerana Plaintif sebagai seorang ibu mempunyai hak pemeliharaan sah (legal guardianship) terhadap anak-anak tersebut;

3. Lain-lain perintah yang dianggap adil dan sesuai oleh Mahkamah; dan

4. Kos permohonan ini ditanggung oleh Defendan.

The other enclosure is encl. (13) which is an application by the plaintiff wife, praying for:

1. Bahawa Defendan dan semua ejen, perkhidmat dan pembantu defendan ditahan daripada memohon kepada mana-mana pihak berkuasa untuk mengambil apa jua tindakan untuk melaksanakan Waran Tangkap yang telah dikeluarkan oleh Mahkamah Tinggi Syariah Selangor menurut permohonan Defendan dalam kes Mal Bil: 10200-028-03/2003 terhadap Plaintif yang bukan seorang beragama Islam sehingga Mahkamah ini membuat keputusan muktamad dalam kes ini atau sehingga keputusan muktamad dibuat oleh Mahkamah Persekutuan berkenaan rujukan khas Mahkamah ini kepada Mahkamah Persekutuan berkenaan kesan Perkara 121(1A) dibaca bersama Perkara 74 Jadual ke-9 Senarai Ke-2 Perlembagaan Persekutuan; dan

2. Bahawa Waran Tangkap yang telah dikeluarkan oleh Mahkamah Tinggi Syariah Selangor menurut permohonan Defendan dalam kes Mal Bil: 10200-028-03/2003 terhadap Plaintif yang bukan seorang beragama Islam digantung perlaksanaannya sehingga Mahkamah ini membuat keputusan muktamad dalam kes ini atau sehingga keputusan muktamad dibuat oleh Mahkamah Persekutuan berkenaan rujukan khas Mahkamah ini kepada Mahkamah Persekutuan berkenaan kesan Perkara 121(1A) dibaca bersama Perkara 74 Jadual ke-9 Senarai Ke-2 Perlembagaan Persekutuan;

3. Kos permohonan ini;

4. Lain-lain perintah yang adil dan suaimanfaat.

In Saman Pemula No. S8-24-3586 Tahun 2003, there is one enclosure, encl. (46) which is ah application by the plaintiff wife praying for:

(a) Bahawa Defendan (suami) dikomitkan ke penjara Sungei Buluh atau mana-mana penjara lain yang difikirkan sesuai oleh Mahkamah diatas:

(i) keingkaran Defendan (suami) memulangkan anak-anak bernama Saktiswaran (4 tahun) dan Theiviswaran (2 tahun) kepada Plaintif (isteri) seperti dikehendaki oleh Perintah Interim Mahkamah Tinggi Malaya bertarikh 17hb. April 2003 yang diberikan melalui Saman Pemula bernombor S8-24-3586-2002 oleh Hakim Mahkamah Tinggi Yang Arif Dato' Md Raus bin Sharif; dan

(ii) keingkaraan Defendan (suami) membayar nafkah sebanyak RM250.00 untuk setiap anak iaitu Saktiswaran (4 tahun) dan Theiviswaran (2 tahun) dengan memasukkan wang ini ke dalam buku akaun simpanan anak-anak seperti yang dikehehdaki oleh Perintah Interim Mahkamah Tinggi Malaya bertarikh 17hb. April 2003 yang diberikan melalui Saman Pemula bernombor S8-24-3586-2002 oleh Hakim Mahkamah Tinggi Yang Arif Dato' Md Raus bin Sharif;

(b) Perintah pengkomitan Defendan (suami) ke penjara Sungei Buloh atau mana-mana penjara lain yang difikirkan sesuai oleh Mahkamah terus berkekalan sehingga:

(i) Defendan (suami) memulangkan anak-anak bernama Saktiswaran (4 tahun) dan Theiviswaran (2 tahun) kepada Plaintif (isteri) seperti yang dikehendaki oleh Perintah Interim Mahkamah Tinggi Malaya bertarikh 17hb. April 2003 yang diberikan melalui Saman Pemula bernombor S8-24-3586-2002 oleh Hakim Mahkamah Tinggi Yang Arif Dato' Md Raus bin Sharif; dan

(ii) Defendan (suami) membayar RM250.00 sebagai nafkah untuk setiap anak iaitu Saktiswaran (4 tahun) dan Theiviswaran (2 tahun) kepada Plaintif (isteri) dengan memasukkan wang ini ke dalam buku akaun simpanan anak-anak seperti yang dikehendaki oleh Perintah Interim Mahkamah Tinggi Malaya bertarikh 17hb. April 2003 yang diberikan melalui Saman Pemula No. S8-24-3586-2002 oleh Hakim Mahkamah Tinggi Yang Arif Dato' Md Raus bin Sharif;

(c) Apa jua perintah lain atau sewajarnya yang difikirkan patut dan suaimanfaat oleh Mahkamah atas alasan-alasan yang dibentangkan di dalam Afidavit Sokongan yang diikrarkan oleh Shamala a/p Sathiyaseelan pada 26 Mei 2003 (Lampiran 30), Pernyataan di bawah Aturan 52 Kaedah 2(2) Kaedah-Kaedah Mahkamah Tinggi 1980, Afidavit Menentusahkan Pernyataan Di bawah Aturan 52 Kaedah 2(2) kaedah-Kaedah Mahkamah Tinggi 1980 yang diikrarkan oleh Sharmala a/p Sathiyaseelan pada 26hb. Mei 2003, Afidavit Tambahan yang diikrarkan oleh Shamala a/p Sathiyaseelan pada 28 Mei 2003 (Lampiran 32), Afidavit Tambahan ke-2 yang diikrarkan oleh Shamala a/p Sathiyaseelan pada 4hb. Jun 2003 (Lampiran 35);

(d) Kos permohonan ini, sebarang kos insidental kepada permohonan ini dan kos mengeluarkan dan melaksanakan perintah di bawah permohonan ini dibayar oleh Defendan.

Dan ambil perhatian bahawa pada pendengaran Notis Usul ini Plaintif (isteri) akan menggunakan Afidavit Sokongan yang diikrarkan oleh Shamala a/p Sathiyaseelan pada 26 Mei 2003 (Lampiran 30). Pernyataan dibawah Aturan 52 Kaedah 2(2) Kaedah-Kaedah Mahkamah Tinggi 1980, Afidavit Menentusahkan Pernyataan Di bawah Aturan 52 Kaedah 2(2) Kaedah-Kaedah Mahkamah Tinggi 1980 yang diikrarkan oleh Shamala a/p Sathiyaseelan pada 26hb. Mei 2003. Afidavit Tambahan yang diikrarkan oleh Shamala a/p Sathiyaseelan pada 28hb. Mei 2003 (Lampiran 32), Afidavit Tambahan ke-2 yang diikrarkan oleh Shamala a/p Sathiyaseelan pada 4 haribulan Jun 2003 (Lampiran 35) yang diserahkan bersama-sama Notis Usul ini kepada Defendan.

This committal proceedings is in respect of the interim order dated 17 April 2003 which states:

ATAS PERMOHONAN PLAINTIF DAN DEFENDAN DAN SETELAH MENDENGAR Encik Sivarasa, Encik Ravi Nekoo dan Cik Paramneswary, Peguam-peguam bagi pihak Plaintif dengan kehadiran Plaintif dan Encik M. Menon, peguam bagi Defendan dengan kehadiran Defendan MAKA DENGAN INI ADALAH DIPERINTAHKAN bahawa sementara menunggu perbicaraan Guaman Sivil No. S8-24-297-2003 Defendan suami diberi akses kepada anak-anak Saktiswaran dan Theiviswaran (seterusnya dikenali sebagai "anak-anak tersebut") pada tiap-tiap hari Sabtu bermula antara jam 1.00 dan 2.00 petang sehingga jam 1.00 dan 2.00 petang pada hari Ahad dan pengambilan anak-

anak dan pengembalian anak-anak tersebut dibuat di rumah Plaintif oleh Defendan DAN ADALAH JUGA DIPERINTAHKAN bahawa Defendan tidak dibenarkan membawa anak-anak tersebut keluar daripada daerah Alor Setar DAN ADALAH JUGA DIPERINTAHKAN bahawa Defendan membayar nafkah sebanyak RM250.00 untuk setiap anak dengan memasukkan wang ini ke dalam buku akaun simpanan anak-anak tersebut DAN ADALAH JUGA DIPERINTAHKAN SECARA INTERIM bahawa waran tangkap yang dikeluarkan oleh Mahkamah Tinggi Syariah Selangor bersamaan Kes Mal Bil: 110200-028-04-2003 tidak dikuatkuasakan sementara menunggu perbicaraan Guaman Sivil No. S8-24-297-2003.

I am of the opinion that the civil court has jurisdiction to hear both the cases which involve the same parties concerning the same matter ie, their civil marriage. The fact that the defendant husband has converted to Islam does not change the status of their civil marriage. The defendant husband's obligation under the Hindu marriage cannot be extinguished or avoided by his conversion to Islam.

The facts are not in dispute. The plaintiff wife and the defendant husband are both Hindus at the time of their marriage. Their marriage was solemnised in a Hindu Temple on 5 November 1998 and registered under the Law Reform (Marriage & Divorce) Act 1976 (the Act). There are two children of the marriage, Saktiswaran 4 years old and Theiviswaran 2 years old. The defendant husband, converted to the Islamic faith on 19 November 2002 and the two children were converted to the Islamic faith on 25 November 2002 by the defendant husband, alone. I pause here to remind parties about the equality of parental rights under s. 5 of the Guardianship of Infants Act 1961 (Act 1961) which provides that the mother of an infant shall have the like powers of applying to the court in respect of any matter affecting the infant as are possessed the father and in relation to the custody and upbringing of an infant, a mother shall have the same rights and authority as the law allows to a father and the rights and authority of mother and father shall be equal. In this case the children Saktiswaran and Theiviswaran are still infants under the said Act 1961.

Eventually through a sequence of events the marriage broke down. On 18 December 2002 the plaintiff wife left the defendant husband with her two children to her parents' house in Alor Setar, Kedah. On 31 December 2002 the plaintiff wife, filed Saman Pemula No. S8-24-3586-Tahun 2002, encl. (1) seeking an order for custody care and control of her two children. This was served on the defendant husband, on 14 January 2003. The matter came up for hearing for the first time on 16 January 2003. The defendant husband, was present in court on that date and sought for an adjournment on the ground

that he needed time to appoint an advocate and solicitor. The court granted the defendant husband's application for an adjournment to allow him to appoint an advocate and solicitor. The matter was then fixed for hearing on 25 February 2003. It is noted that the plaintiff wife's, solicitors received confirmation on 27 January 2003 from Messrs. Jaffar & Menon that they have instruction to accept service of process for the civil suits. On 25 February 2003 the defendant husband's solicitor filed an application for postponement and this was granted by the court and the matter was postponed to 17 March 2003.

In the meantime the defendant husband had quietly through his solicitors Messrs. Jaffar & Menon filed on 7 January 2003 an application to Mahkamah Tinggi Syariah Selangor *vide* kes Mal Bil. 10200-028-03/2003 for an *ex parte* hadanah (custody) of the two children. I think there is suppression of evidence by the defendant husband here as he did not reveal this fact on 16 January 2003 when he applied for an adjournment of the civil case which was granted by the Civil Court on the ground that he wanted to appoint an advocate and solicitor which is a lie since he had already appointed Messrs. Jaffar & Menon on 7 January 2003, the same advocates and solicitors handling his civil suit in the High Court, Kuala Lumpur. The court was misled by the defendant husband on 16 January 2003, when it was already within his knowledge an application for custody in the Syariah Court of the two children was made on 7 January 2003 by the same advocates and solicitors handling his Syariah and Civil suits. On 9 February 2003 the *ex parte* hadanah application dated 28 January 2003 was served on the plaintiff wife. It is observed that this is the first time the plaintiff wife had knowledge about the *ex parte* hadanah application in the Syariah Court in Selangor. The plaintif wife then informed her solicitors Messrs. Nekoo Parames & Tung about the *ex parte* hadanah application. It is observed that her solicitors wrote to the defendant husband's solicitors on 13 February 2003 requesting for copies of the cause papers in respect of the *ex parte* hadanah application. They received the cause papers on 20 February 2003. I must at this juncture briefly state that the *ex parte* hadanah application dated 28 January 2003 is not binding on the plaintiff wife and if served on the plaintiff wife it has no effect because the plaintiff wife is a non-Muslim. The Syariah High Court Selangor has no jurisdiction on parties who are non-Muslim. Although the *ex parte* hadanah application dated 28 January 2003 was endorsed by the Kedah Syariah Court who has reciprocal enforcement arrangements with the Selangor Syariah Court (exh. "MK2" in the further affidavit) it still is not binding on the plaintiff wife who is a Hindu and the application is of no effect on her. On 27 March 2003 the same Syariah Court issued a warrant of arrest against the plaintiff wife for failure to attend the said Syariah Court. I cannot understand why the said Syariah Court whose jurisdiction is territorial and over

matrimonial disputes involving Muslim marriages only can issue such a warrant. The plaintiff wife is not a Muslim. She is a Hindu. I am of the opinion that it is unconstitutional for the said Syariah Court to issue the warrant of arrest against the Plaintiff Wife. In any event the order for Warrant of Arrest has been stayed by the court on 17 April 2003 pending the outcome of the Saman Pemula No. S8-24-297-2003. In any event it is hereby noted that on 7 July 2003 the stay order was vacated when the two cases Saman Pemula No. S8-24-297-2003 (encls. (1) and (13)) and Saman Pemula No. S8-24-3586-Tahun 2003 (encl. (46)) were fixed to be heard together and parties were ordered to submit written submission on those enclosures in the said two cases. The said cases were heard on 15 July 2003 when the court ordered parties to submit further written submission on these enclosures and the said two cases were fixed for decision on 11 September 2003. On 11 September 2003, I allowed the following advocates and solicitors to be present in court. Mr. Ang Hean Leng and Encik Malik Imtiaz for the Bar Council, Ms. Rasamani Kandiah holding watching brief for the All Women Lawyers Association and Encik Harris Ibrahim holding watching brief for (a) All Women's Action Society (Awam), (b) Women's Aid Organisation (WAO), (c) Women's Centre for Change (WCC), (d) Sisters in Islam (Sis).

In this case the defendant husband has converted to Islam on 19 November 2002 under s. 51 of Act which *inter alia* provides:

> Where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce ...

Therefore the defendant husband is regarded as having committed a matrimonial offence thereby enabling the plaintiff wife who has not so converted to petition for divorce. The effect of the law is that the defendant husband cannot obtain a divorce at all. The defendant husband cannot obtain a divorce under the Act as s. 51 only gives the right to apply for divorce to the party who has not converted to Islam ie, the plaintiff wife. The defendant husband cannot apply for divorce under the Islamic Family Act as the Syariah Court has no jurisdiction to deal with any case where one of the parties is not a Muslim. By way of analogy it can be noted that although s. 46 of the Islamic Family Law (Federal Territories) Act 1984 gives the Syariah Court power to confirm that the conversion to Islam by either party to a non-Muslim marriage may dissolve the marriage, this does not seem to be effective to terminate the marriage as far as the other party is concerned. This is because by virtue of s. 4 or s. 8 of the Act, such marriage, if valid, shall continue until dissolved: (a) by the death of the parties, (b) by order of a court of competent jurisdiction or (c) by a decree of nullity made by a court of competent jurisdiction. "court" is defined to mean the High Court or a judge thereof. Thus in *Pedly v. Majlis*

Agama Islam, Pulau Pinang [1990] 2 MLJ 307, Wan Adnan J (as he then was) held that "(a) non-Muslim marriage is not dissolved upon one of the parties converting to Islam. It only provides a ground for the other party who has not so converted to petition for divorce.".

The Civil Court is established under art. 121 of the Federal Constitution. The Syariah Courts are created by State Laws given by Item 1 of the State List in the Ninth Schedule of the Federal Constitution. Their jurisdiction is spelt out in Item 1 of the State List. According to Item 1 of the State List, the jurisdiction of the State Syariah Courts over criminal matters must be conferred by Federal law. The Syariah Courts (Criminal Jurisdiction) Act 1965 provided that the jurisdiction shall not be exercised in respect of any offence punishable with imprisonment for a term exceeding three years or with any fine exceeding five thousand ringgit or with whipping exceeding six strokes or with any combination thereof. Since Syariah Courts are established by their respective State laws, their jurisdiction are confined to their respective State territorial jurisdiction over matters relating to Islamic law. By the enactment of the Act A704 of 1988 an amendment to art. 121 of the Federal Constitution is made to provide that the High Court and courts subordinate to it shall have no jurisdiction in any matter in which the Syariah Courts have jurisdiction. Harun Hashim SCJ in *Mohamed Habibulllah bin Mahmood v. Faridah bte. Dato' Talib* [1993] 1 CLJ 264 said at p. 268, "it is obvious that the intention of Parliament by art. 121 (1A) is to take away the jurisdiction of the High Courts in respect of any matter within the jurisdiction of the Syariah Court. *Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah Bukit Mertajam & Anor.* I am therefore of the opinion that when there is a challenge to jurisdiction, as here, the correct approach is to firstly see whether the Syariah Court has jurisdiction and not whether the State Legislature has power to enact the law conferring jurisdiction on the Syariah Court." Therefore where one Syariah Court issues a warrant or summon under a provision of any law in force in that State, that warrant or summon is unable to be served or executed on any person though professing the Islamic faith who is or is believed to be in another State. This is due to the separate jurisdiction and not having reciprocal arrangements between Syariah Courts.

What is before me is a dispute involving a Hindu marriage between the plaintiff wife and the defendant husband entered into on 5 November 1998. As the law, statutory and case law stand today, the defendant husband's obligation under the said Hindu marriage will not and cannot be extinguished or avoided by his conversion to Islam. His wife's application is under the Act. The defendant husband by converting to the Islamic faith is in effect converting his marital status from a monogamous marriage to a polygamous marriage. Under s. 51 of the Act the defendant husband cannot file a divorce petition against his

unconverted plaintiff wife who remains a Hindu. She remains his wife though a non-Muslim. Only she may petition for divorce on the ground that the defendant husband has committed a matrimonial offence by his conversion to Islam. I am of the opinion that the defendant husband, now a Muslim though cannot file a petition for divorce against his plaintiff Hindu wife, can take another wife – a Muslim wife because the defendant husband being a Muslim is now practising a polygamous marriage. His wife by Hindu rites remains his wife. He has to support her and the children until and unless the civil marriage is dissolved and the petition for dissolution of that Hindu marriage may only be presented by the unconverted wife under s. 51 of the Act. The word used in the section is "may" ie, to maintain the status of the civil marriage (Hindu marriage) if the unconverted wife wishes to remain the wife of her converted husband although the converted husband can take another wife if he can do justice as the Holy Quran Al-Nisa (IV) Ayat 3 states and which reads, "if ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two, three or four; but if ye fear that ye shall not be able to deal justly (with them), Then only one, or (a captive). That your right hand possess, that will be more suitable, to prevent you from doing injustice." (See the meaning of the Glorious Quran Text, Translation by Abdullah Yusuf AH, p. 100). It is instructive to note that when the Reform Bill to cl. 51 was introduced in Parliament the Deputy Minister for Law, Datuk Athi Nahappan said:

> The purpose of this, as I understand it, is that if a non-Muslim husband becomes a Muslim, then what is to happen to the wife? Now she has more than one choice. She can convert herself, if she wishes, in which case both the husband and wife, even under the Islamic law, are allowed and they are recognised as Muslims. Under the Islamic law, on the other hand, she can wait for about three menstruation periods, roughly about three months, and during that time she can consider whether she wishes to become a Muslim.
>
> The provision here gives a discretion. It only uses the word "may" petition for divorce. It does not make it mandatory on her to part to break away from her husband merely because he has changed religion, but it gives her the option to join the Islamic religion with her husband or remain out of conversion. If she merely remains as a wife – under the law she remains to be a wife – because under this law she is not technically divorced. She stands married to her husband. Under section 3 of the Maintenance of Married Women's and Children's Ordinance, 1950, she is entitled to maintenance. So are her children. But it is not very clear, as it stands, whether she would be entitled to maintenance under this Bill, as has been rightly raised by the Honourable Member for Telok Kemang. So the right that is given to the wife, Tuan Yang Di Pertua, is a discretion. She "may" exercise it, she "may not" exercise it. But this has been given as a ground. If she wants, she can seek

a divorce and in which case the normal rule, as provided in clauses 50 and 55 would not be applicable – she does not have to wait two years to file her petition for divorce. She is given three months to ponder over it. That is the rationale of the three months mentioned in the proviso to clause 51. The word "Islam" is mention there – it is unfortunate. I only assume that this was put in there because there is a situation here of two types of marriages in this country when this become law. One type is the polygamous system and the other type would be the monogamous system. The monogamous system would cover nearly half the population and would cover the non-Muslims except the natives of East Malaysia and the aborigines of West Malaysia. So by and large, the non-Muslims would be adopting the monogamous system under this law and the Muslims will continue under their religious law. So the possibility of converting to a polygamous system in this country can only be from any one of the existing religions like Hinduism or Buddhism or Christianity – from one of these into Islam which allows the polygamous system. So in order to be precise, the word "Islam" has been put in here in so far as Malaysians are concerned and within the context of our country. I am sure our Government would never, never do anything anywhere and particularly in a legislation to derogate the Islamic religion because it knows that Islam is the State religion and we have the greatest of respect for that religion and it is not the intention at all. The intention is merely to provide clarity, to show the juxtaposition of the two sets of religion which would provide two types of marriages in this country.

(See *The Administration of Islamic Law in Malaysia* by Ahmad Mohd. Ibrahim, pages 351-353)

The plaintiff wife filed an Originating Summons No. S8-24-3586-2002 in encl. (1) and an affidavit in support in encl. (2) seeking for an order for custody, care and control of her two children and this application was served on the defendant husband on 14 January 2003. The matter came up for hearing for the first time on 16 January 2003. The defendant husband came to court and sought for an adjournment on the ground that he needs time to appoint a solicitor. The court granted the defendant husband's application for an adjournment to allow the defendant husband to appoint a solicitor. The matter was fixed for hearing on 25 February 2003. In the meantime the defendant husband had through his solicitors Messrs. Jaffar & Menon filed an application in the Mahkamah Tinggi Syariah Selangor *vide* Kes Mal Bil: 10200-028-03/ 2003 for an *ex parte* hadanah of the two children on 7 January 2003.

This fact was not made known to the Civil Court when the defendant husband appeared in court on 16 January 2003. It is noted that on 27 January 2003 solicitors for the plaintiff wife Messrs. Nekoo Parames & Tung received confirmation from Messrs. Jaffar & Menon that they have instructions to accept

service of process. Enclosure (1) is the plaintiff wife's application seeking for an order for custody, care and control of her two children which came up for hearing on 12 April 2003. A preliminary objection was raised by the defendant husband's solicitors on the jurisdiction of the Civil Court to hear the custody application. The court heard arguments of both counsel and on 4 April 2003 decided that the Civil Court has jurisdiction to hear the matter. The defendant husband has since filed an appeal to the Court of Appeal. The court then fixed the matter for hearing on 17 April 2003. In the meantime the *ex parte* hadanah application dated 28 January 2003 from the Mahkamah Tinggi Syariah Selangor was served on the plaintiff wife by the defendant husband on 9 February 2003. On 27 March 2003, the same Syariah High Court issued a warrant of arrest against the plaintiff wife for failure to attend the said Syariah Court. On 17 April 2003 the court heard the plaintiff wife custody application. The defendant husband complained about the restricted access he is given by the plaintiff wife. The plaintiff wife complained about the warrant of arrest that was issued against her by the Mahkamah Tinggi Syariah Selangor. The court gave an interim order, giving: (i) access to the defendant husband on Saturday from 1-2pm, to 1-2pm on Sunday, (ii) the defendant husband is prohibited from taking the two children out of Alor Star, Kedah, (iii) the defendant husband is to pay RM250 – maintenance to each of the two children, (iv) the warrant of arrest issued on 27 March 2003 by the Syariah High Court Selangor against the plaintiff wife is stayed until the disposal of Saman Pemula No. S8-24-297-2003.

The defendant husband was allowed to take the two children from the plaintiff wife's house in Alor Setar on Saturday and returned them on Sunday. This the defendant husband did on five different occasions in compliance with the interim order. This is as follows:

	Saturday (time)		**Sunday (time)**		
(a)	19 April 2003	– 1.05pm.	20 April 2003	–	1.10pm.
(b)	26 April 2003	– 1.23 pm.	27 April 2003	–	1.25pm.
(c)	3 May 2003	– 1.05pm.	4 May 2003	–	1.20 pm.
(d)	10 May 2003	– 1.15pm.	11 May 2003	–	1.16 pm.
(e)	17 May 2003	– 1.05pm.	18 May 22003	–	1.30 pm.
(f)	24 May 2003	– 1.00 pm.	(did not return the two children)		

On 23 May 2003, the plaintiff wife received by courier an order dated 8 May 2003 from the Mahkamah Tinggi Syariah Selangor giving hadanah (custody) of the two children to the defendant husband. I must stress here that the fact the defendant husband did not return the two children on 25 May 2003 is in breach of the interim Civil Court order dated 17 April 2003. This is in contempt of court. The fact that custody of the two children is given to the defendant husband by virtue of the hadanah order dated 8 May 2003 issued by the Syariah High Court Selangor did not change the status of the interim Civil Court order given earlier than the Syariah hadanah order. The interim Civil Court order is made by a court of competent jurisdiction and is binding on the plaintiff wife and the defendant husband equally.

As to the Syariah hadanah order dated 8 May 2003 giving custody of the two children to the defendant husband, I am of the view that that hadanah order is not binding on the plaintiff wife who is a non-Muslim. The Syariah High Court Selangor has no jurisdiction to enforce the order on the non-Muslim plaintiff wife. Again it is only effective within the jurisdiction of the Syariah High Court which is in the State of Selangor only. Even if the hadanah order dated 8 May 2003 is endorsed by the Kedah Syariah Court like the *ex parte* hadanah application dated 28 January 2003 (see exh. "MK2") it is still not binding on the non-Muslim plaintiff wife. What more in this case I observe that the said hadanah order is not so endorsed by the Kedah Syariah Court.

On 27 May 2003 the plaintiff wife filed an application for leave to commence committal proceedings (Lampiran (29)) against the defendant husband on the basis that the defendant husband had failed to comply with the interim order dated 17 April 2003, when he failed to return the two children to the plaintiff wife on 25 May 2003 and took them out of the Alor Setar district and failed to pay RM500 for the maintenance of the two children. The matter came up for hearing on 30 May 2003. The court had wanted to know what transpired in the Syariah High Court Selangor and hence it was adjourned to 6 June 2003. Subsequently the plaintiff wife filed an affidavit tambahan kedua affirmed on 4 May 2003 exhibiting the notes of proceedings of the Syariah High Court Selangor as well as the various letters that were sent to the said Syariah High Court and to the defendant husband's solicitors by the plaintiff wife solicitors. I observe that the plaintiff wife solicitors have complied with the procedural O. 52 r. 2 of the Rules of the High Court 1980 (KMT) 1980. A fair copy of the interim order dated 17 April 2003 was filed and served on the defendant husband's solicitors on 27 May 2003. A copy of the notis usul *(ex parte)*, affidavit sokongan, penyataan di bawah A. 52(2) KMT 1980 and affidavit menentusahkan kenyataan di bawah A. 52(2) KMT 1980 with affidavit tambahan and affidavit tambahan kedua were served on the defendant husband's

solicitors on 2 June 2003. A copy of the interim order dated 17 April 2003, notis usul *(ex parte)*, affidavit sokongan, pernyataan di bawah A. 52(2) KMT 1980 with affidavit tambahan and affidavit tambahan kedua were served on the defendant husband on 4 June 2003. An affidavit of service was filed on 5 June 2003. It is noted that the nature of the contempt is clearly set out in the affidavit sokongan as well as in the pernyataan di bawah A. 52(2) KMT 1980. On 6 June 2003 the defendant husband and his solicitor Mr. J.T. Sambanthan were present in curt at the hearing of the plaintiff wife's application for leave to commence committal proceedings against the defendant husband. On that day the court granted the plaintiff wife leave to commence committal proceedings against the defendant husband. Subsequently the notice of motion to commit the defendant husband to prison was filed on 10 June 2003.

As to the commencement of committal proceedings against the defendant husband, I observe that the plaintiff wife's solicitors have once again complied with the procedural O. 52 r. 2 of the KMT 1980. The order giving leave to commence committal proceedings dated 6 June 2003 was filed on 20 June 2003 and served on the defendant husband on 24 June 2003. The notis usul filed on 10 June 2003, affidavit sokongan, pernyataan di bawah A. 52(2) KMT and affidavit menentusahkan pernyataan di bawah A. 52(2) KMT together with affidavit tambahan and affidavit tambahan kedua were served on the defendant husband on 24 June 2003 and on his solicitors on 26 June 2003. An affidavit of service was filed on 27 June 2003.

Solicitors for the defendant husband submitted that the committal proceedings is defective for procedural non-compliance. I disagree with the said submission. It is plain that on 6 June 2003 the defendant husband and his solicitors were present in court and no objection was raised either by the defendant husband or his solicitors. Order 45 of the KMT 1980 provides in gist that under r. 7(5) it requires a copy of the Order to be served. And r. 7(6)(a) states that an Order need not be served if the person against whom it is sought to enforce the order has had notice thereof by being present when the order was made. In this case the Defendant Husband and his solicitors were present in court when the said interim order was made. In point of fact the defendant husband obeyed with the terms of the said interim order five times. In any event under r. 7(7) the court may dispense with service of the copy of the said interim order if it thinks it just to do so. In the circumstances of this case I come to the conclusion that the defendant husband has not been acting *bona fide*. Azmi SCJ in the Federal Court case of *Mohamed Habibullah bin Mahmood v. Faridah Dato' Talib* [1993] 1 CLJ 264 citing Lord Diplock in the case of *Hunter v. Chief Constable of the West Midlands Police & Ors.* [1982] AC 529 at p. 536 applied the same principle and said, "... it is difficult to imagine

how the administration of justice can be served if the parties are allowed to abuse the process of court by hopping from one jurisdiction to another over the same subject matter." No doubt that the defendant husband is now a Muslim and have obtained certain orders in his favour from the Mahkamah Tinggi Syariah Selangor but the fact is, those said orders are not binding on the plaintiff wife who is a non-Muslim. But the defendant husband though a Muslim still owes obligation under his civil (Hindu) marriage with the plaintiff wife and these marital obligations will not and cannot be extinguished or avoided by his conversion to Islam. The civil (Hindu) marriage is very much alive unless and until it is brought to an end by the plaintiff wife. The defendant husband who is now a Muslim cannot do anything. The plaintiff wife will be his unconverted wife so long as she wants to be. That is the effect of conversion to Islam on a civil marriage under s. 51 of the Act. What is worse here is the effect of s. 51 is that the defendant husband who has converted to Islam cannot obtain a divorce at all. I come to the conclusion that the defendant husband has full knowledge of the said interim order. He also has complied with the terms of the said interim order five times. The interim order was made by a court of competent jurisdiction in the present of parties and their solicitors. All procedural rules in respect of committal proceedings have been complied with. I must do my duty in accordance to laws passed and intended by Parliament, otherwise it would prejudice the minds of the general public against the courts.

For these reasons I grant order in terms of both the plaintiff wife's application in encl. (46) of Saman Pemula S8-24-3586-2002 and also in her applications in encl. (1) and encl. (13) in Saman Pemula S8-24-297-2003.